# in the Supreme Court of the United States

OCTOBER TERM 1976

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## MISC. NO. 76-28

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HAROLD S. GOLDEN and DAVID FINCHER,
*Petitioners,*

*vs.*

BISCAYNE BAY YACHT CLUB,
*Respondent.*

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## RESPONDENT BISCAYNE BAY YACHT CLUB'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

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## PRELIMINARY STATEMENT

The sole Respondent to the subject Petition is the BISCAYNE BAY YACHT CLUB. An original defendant, CITY OF MIAMI, was dismissed in the trial court from which dismissal no appeal was taken. *Golden v. Biscayne Bay Yacht Club*, S.D. Fla.1973, 370 F.Supp. 1038, 1044.

The plaintiffs received no relief against individual defendants, Mayor and City Commissioners of the City of Miami, in the trial court and no appeal was taken therefrom. *Id.* at 1044. In the light of the foregoing, only the Petitioners and Respondent, BISCAYNE BAY YACHT CLUB, have participated in the subsequent appellate proceedings.

The Respondent, BISCAYNE BAY YACHT CLUB, shall hereinafter be referred to as CLUB. All emphasis is added unless otherwise indicated.

## STATEMENT OF THE CASE

In the interest of clarity, conciseness and completeness the material facts are restated as follows:

The CLUB was organized as a private yacht club in 1887.

In 1932 the CLUB purchased and has continued to own the premises upon which the CLUB is situated at 2540 South Bayshore Drive, Coconut Grove, Florida, adjacent to Biscayne Bay.

Docks were constructed extending from the bulkhead line over bay bottom land.

Subsequent thereto, in 1962, by virtue of a deed from the trustees of the Internal Improvement Fund of the State of Florida the City of Miami asserted ownership over the aforementioned bay bottom land and such was thereinafter leased from the City by the CLUB at an annual rental of $1.00.



Except for the existence of the lease, the City of Miami never participated in and was never involved in the operation of the CLUB.

Membership, which has been limited to 250 members since 1962, is by member sponsorship only.

The CLUB by-laws have never prohibited membership to the Jewish faith or Black race.

No *known* present or past member of the CLUB with the exception of one honorary member have been either Jewish or Black.

No proposal for membership pursuant to the CLUB by-laws was ever submitted on behalf of either Petitioner.

The CLUB does not monopolize access to use of the public waters of Biscayne Bay.

The City of Miami enacted a non-discrimination ordinance referable to leased City "property" or "facilities". The trial court made no finding nor ruling referable to the applicability or inapplicability of such ordinance but based its decision and finding of state involvement "(b)y virtue of the lease". *Id.* at 1042.

The majority of the Fifth Circuit, sitting en banc, based upon the foregoing concluded as follows:

> "the facts and circumstances fall far short of the symbiotic relationship found in *Burton*

*supra*. As a matter of law and fact, they fall short of establishing that the City of Miami has so far insinuated itself into a position of interdependence with the club that it must be recognized as a joint participant in the internal membership policies of the club. The City of Miami has not significantly involved itself in those membership policies. The lease does not provide a sufficiently close nexus between the city and the club so that the action of the club may be fairly treated as that of the city."

530 F.2d 16, 22.

## REASONS FOR DENYING THE PETITION

1. NEITHER SPECIAL NOR IMPORTANT ISSUES OF CONSTITUTIONAL LAW ARE INVOLVED IN THE DECISION BELOW.

Without diminishing the importance of any appellate decision involving constitutional or alleged constitutional rights, the majority court below did no more than to follow the instructions of this Court set forth in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, 81 S.Ct. 856, 6 L.Ed.2d 45, by sifting the undisputed facts and weighing the circumstances from which they reached the legal and factual conclusion that the required significant involvement with discrimination on the part of the state was lacking. *Reitman v. Mulkey*, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830.

The Respondent joins in agreement with Petitioner as expressed that "(t)he issue is merely the application of



the governing law of *Burton, Moose Lodge* and *Gilmore* to undisputed facts." It is respectfully submitted that the application of governing law to undisputed facts is a common appellate practice and were such grounds for certiorari jurisdiction before the Supreme Court of the United States, this Court's burden represented by its case load would be overwhelming. Having set forth the applicable guide lines in the aforesaid decisions, the application thereof to undisputed facts hardly creates "special and important" issues of constitutional law. Supreme Court Rule 19.

If every lease of state property does not create federal jurisdiction, as was so recognized in *Burton v. Wilmington Parking Authority*, *supra*, then surely a nominal lease of bay bottom land, adjacent to private property and therefore reasonably inaccessible and of no practical use to the public, does not, particularly under circumstances where such bay bottom had been used by the adjacent private land owner for 30 years prior to such lease.

If the privilege of a state liquor license to a private club, admittedly discriminating in its service of liquor, did not constitute significant involvement with invidious discrimination, as was so recognized in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct.1965, 32 L.Ed.2d 627, then surely a nominal lease first entered into in 1962 does not constitute significant involvement with alleged discrimination in membership practices, which had existed for 75 years prior thereto.

If the lease of state property neither used nor needed for state purposes in the absence of (1) a discriminatory purpose (2) joinder in the private enterprise and (3) reservation of control by the state does not create federal

jurisdiction or constitute color of law as was so noted in *Wimbish v. Pinellas County, Florida*, 5 Cir.1965, 343 F.2d. 804 and *Darrington v. Plummer*, 5 Cir.1956, 240 F.2d. 922, then surely the lease of a *limited* area of bay bottom land never used for city purposes, never needed for city purposes and for which there could be no other reasonable use than that for which it was being used by the adjacent property owner does not do so.

See also *Greco v. Orange Memorial Hospital Corp.*, 5 Cir.1975, 513 F.2d 873, cert.den'd, 96 S.Ct. 433, 46 L.Ed.2d 376; *New York City Jaycees, Inc. v. United States Jaycees, Inc.*, 2d Cir.1975, 512 F.2d 856; *Jackson v. Metropolitan Edison Company*, 1974, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed. 2d 477.

The *en banc* decision of the Fifth Circuit Court of Appeals is well within the judicial guidelines for similar issues and was reached in full accord with previously expressed instructions of this Court.

2. THE DECISION BELOW IS NOT IN CONFLICT WITH *GILMORE v. CITY OF MONTGOMERY*, 1974, 417 U.S. 556, 94 S.Ct. 2416, 41 L.Ed.2d 304.

Contrary to the argument of Petitioners, the minimal bay bottom land of Biscayne Bay encompassed by the extension of docks from the CLUB property was *not* a *freely accessible* area or facility, as recognized by the majority opinion below in the light of the inability of the public to have means of ingress or egress because of the adjacent private property of the CLUB. Such limited area of bay bottom land was quite obviously only a small segment of City owned bay bottom land along the City of Miami shoreline



and clearly falls without the *exclusive* use principle as recognized in *Gilmore v. City of Montgomery, supra*, at p. 2422 fn. 7. The clear distinction between the circumstances *sub judice* and efforts to circumvent or ignore a desegregation order as was so recognized in *Gilmore* is clearly apparent. Indeed the subject lease neither involves the *exclusive use* of all bay bottom land owned by the City nor even a limited portion thereof otherwise *freely accessible* to the public.

3. THE DECISION BELOW PRESENTS NEITHER IMPORTANT NOR UNIQUE CONSTITUTIONAL ISSUES.

Although the dissenting opinion below in its apparent effort to extend federal jurisdiction over the membership policies of genuinely private clubs may appear unique, if not surprising, such unsuccessful effort in and of itself does not thereby create nor give birth to an "important" constitutional issue. To the contrary the majority decision below both recognizes and applies applicable judicial guidelines to a long recognized question of state action and color of law.

For the Petitioner herein to argue and/or imply subterfuge on the part of a governmental body in the light of the circumstances *sub judice* wherein the CLUB membership practices complained of had been in effect for 75 years and the docks over bay bottom land had been in existence for 30 years prior to the lease agreement is indeed an effort to raise non-existent false or straw issues. The trial court expressly found the CLUB "was not formed as a subterfuge to evade the civil rights laws." *Golden v. Biscayne Bay Yacht Club, supra* at 1041.

## CONCLUSION

For the reason set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

By: _____

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent Biscayne Bay Yacht Club's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, was mailed to BRUCE S. ROGOW, ESQ., American Civil Liberties Union Foundation of Florida, Nova University Center for the Study of Law, 3301 College Avenue, Fort Lauderdale, Florida 33314; MAURICE ROSEN, ESQ., 16666 N.E. 19th Avenue, North Miami Beach, Florida 33162; WARREN S. SCHWARTZ, ESQ., 1140 N.E. 163rd Street, North Miami Beach, Florida 33162; MELVIN L. WULF, ESQ., American Civil Liberties Union Foundation, 22 East 40th Street, New York, New York 10016, Counsel for Petitioners, this _____ day of _____, 1976.

By: _____

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